Supreme Court, U.S.
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No. ____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Stephen Johnson, Petitioner,

v.

Jesse Brown, Secretary of Veteran Affairs, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro se

39 pp

QUESTION PRESENTED

This case involved the discharge of a federal employee, who was proceeding pro se. At trial, a government defense was that he did not notify the agency about his mental disability before proposed discharge; however, the court refused to instruct the jury about his procedural right to reply to the charges after proposed discharge, which was based on the Due Process Clause and 38 U.S.C. § 7462(a)(3)(B). On appeal, this constitutionally protected statutory right was discussed in the initial briefs by the pro se appellant, but not in the supplemental briefs by the pro bono counsel or in the decision by the court of appeals. The question presented is whether the court of appeals' practice of using supplemental briefs by a pro bono counsel, without considering the pro se briefs, deprives a pro se appellant of a reasonable opportunity to be heard, which violates the Due Process Clause.

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Stephen Johnson, Petitioner,

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Jesse Brown, Secretary of Veteran Affairs, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Stephen Johnson respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at A-1.) is unreported.

JURISDICTION

The Memorandum Decision from the United States Court of Appeals for the Ninth Circuit was filed on December 17, 1997.

The order denying the Petition for Rehearing was filed on March 3, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1997).

STATUTORY PROVISION INVOLVED

Section 7462 of the Dept. of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, 105 Stat. 187, 203 (1991), in relevant part, states:

> In any case . . . which could result in a major adverse action, the employee is entitled to the following:
>
> . . . .
>
> A reasonable time, but not less than seven days, to present an answer orally or in writing to the Chief Medical Director or other deciding officer. . .

Appellant's Opening Br. at A-29. This statute has been codified in 38 U.S.C. § 7462(a)(3)(B), but "Chief Medical Director" has been replaced by "Under Secretary for Health."

STATEMENT

Since the decision by the court of appeals did not mention a constitutional issue, this statement is more detailed than usual, in order to show that a constitutionally protected statutory right was properly before the court.

I. Case Summary

This is an employment discrimination case brought under the Rehabilitation Act of 1973. The petitioner was a federal employee, who worked for the Department of Veterans Affairs at American Lake VA Medical Center in Tacoma, Washington.

On January 5, 1993, he received a letter of proposed discharge for insubordination for refusing to take a basic life support test. ER at 5.[1] This letter was drafted to comply with the disciplinary and grievance procedures in the Dept. of Veterans Affairs Health-Care Personnel Act of 1991. Appellant's Opening Br. at A-26. On the same day, he met with the agency's Equal Employment Opportunity (EEO) counselor and filed an informal complaint of employment discrimination based on mental and physical disability, which triggered the Rehabilitation Act of 1973.[2]

Seven days later, on January 12, 1993, he also responded in a memorandum to the agency stating that he had a mental

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Note 1. In this brief, SERII refers to Appellee's Supplemental Excerpts of Record II (the entire trial transcript) and ER refers to Appellant's Excerpts of Record. A-[page number] refers to the appendix of this or whichever other brief is specified in the citation.

Note 2. Starting on January 5, 1993, when he received the letter of proposed discharge, both the Dept. of Veterans Affairs Health-Care Personnel Act of 1991 and the Rehabilitation Act of 1973 applied to his case. "When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.* 308 U.S. 188, 199 (1939).

disability and had contacted the EEO counselor. ER at 12. On the same day, the agency replied and stated that "contacting and providing information to an EEO counselor through the informal complaint process does not constitute a 'reply' for the Medical Center Director's consideration regarding your Proposed Removal from employment." ER at 13.

On January 28, 1993, he filed a formal EEO complaint. Several days later, he received a letter of discharge, dated January 29, 1993, with an effective date of February 8, 1993.

An administrative hearing was held on April 11, 1994. On April 28, 1994, the administrative law judge ruled there was no discrimination. This decision was followed by a final adverse ruling by the Department of Veteran's Affairs.

On July 15, 1994, proceeding pro se, Johnson filed this civil action in U.S. District Court. The basis for federal jurisdiction was the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794a (Supp. 1997), and the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000e-5(f) through (k), 2000e-16 (1994).

At a pretrial conference the case was bifurcated into a liability phase and a damages phase.

In November 1995, after a four-day jury trial on the liability issue, the jury returned a defense verdict. The trial court entered judgment on the verdict on November 20, 1995. On November 28, 1995, the trial court denied Johnson's motion for a new trial.

On December 13, 1995, Johnson, proceeding pro se, filed a notice of appeal.

On March 13, 1997, after review of the record and the initial briefs, the court of appeals instructed the clerk to appoint a pro bono counsel to represent appellant and to establish a supplemental briefing schedule. App. at A-7. This was finalized in an order from the clerk on March 27, 1997. App. at A-8.

Following oral argument on November 4, 1997, the court of appeals filed a memorandum decision on December 17, 1997 that affirmed the lower court decision. App. at A-1. On March 3, 1998, the court of appeals denied Johnson's petition for rehearing and suggestion for rehearing en banc. App. at A-6.

II. The Courts Were Informed About the Constitutionally Protected Statutory Right That Formed the Basis for Proposed Instruction 14.

A. Pre-Trial Motion for Partial Summary Judgment on Notification

Since timely notification had been an issue during the administrative hearing, Johnson looked for case law on this issue. He found *Noe v. U.S. Postal Service*, 28 M.S.P.R. 86 (1985)(WL, FLB-MSPB database). This was directly on point and was a Rehabilitation Act case. Appellant's Opening Br. at 25:2; A-21. He then submitted a motion for partial summary judgment on notification, which described his theory in detail. ER 32. The brief described his constitutionally protected statutory right:

> [T]he disciplinary and grievance procedures provide the employee with the right to respond to adverse actions both orally and in writing, in a reasonable time, but not less than seven days. Dept. of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, 105 Stat. 187, 203 (1991). **This right is conferred upon the employee by the Fifth Amendment's due process clause. This right has been upheld by several Supreme Court decisions**, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). [Emphasis added.]

ER at 38-9.

This was repeated verbatim in plaintiff's trial brief. Just before trial, he used this material to prepare proposed instruction 14. ER 69.

B. Proposed Instruction 14

Instruction 12, entitled "Elements of Proof" stated:

> On plaintiff's employment discrimination claim, the plaintiff has the burden of proving each of the following by the preponderance of the evidence:
>
> 1. Plaintiff was an individual with handicaps;
>
> 2. Plaintiff was a qualified employee, with reasonable accommodation;
>
> **3. Plaintiff notified the Agency about his handicaps in a timely manner, so they knew or should have known that he was an individual with handicaps**; and
>
> 4. Plaintiff was discharged because of his handicaps.
>
> If plaintiff proves each of the above, then the defendant has the burden of proving the following by the preponderance of the evidence:
>
> 1. Defendant provided plaintiff with reasonable accommodation for his known physical and mental limitations; or that accommodation would have imposed an undue hardship on the operations of its programs. [Emphasis added.]
>
> . . . .

ER at 71.

Paragraph 3 of instruction 12 described the requirement of the employee to notify the employer about his disability in order to trigger the Rehabilitation Act. To amplify paragraph 3, Johnson proposed instruction 14, which was entitled "Notification About Handicaps" and described his constitutionally protected statutory right. It stated:

> In order to obtain reasonable accommodation, the employee must notify the agency about his or her handicaps. The notification need not be early. **A federal employee against whom an adverse action is taken, such as proposed discharge, has a right to reply to the charges, within not less than seven days.** The right to reply must include the right to assert that he is an individual with handicaps. In order to give meaning to the reply, the agency must consider the employee's assertion in reaching its decision, even if the reply was the first notice of the possibility that the handicap may account for the employee's actions. While the employee's simple assertion of the handicap does not constitute proof of it, the agency may not thereafter claim complete ignorance of the allegation. [Emphasis added.]

ER at 69.

Instruction 14 was initially accepted by the trial court, but during the first colloquy on this instruction, it was removed, and instruction 18 was substituted. ER at 72. Johnson objected and asked that the part of this instruction about timely notification [emphasized sentence above] be reinstated. SERII 392:23. Johnson specifically marked this sentence for the trial court, when he mentioned the "seven-day period" and said "that's the crucial part of this instruction." SERII 393:6.

The words "employee," "adverse action," "charges," and "not less than seven days" had all been obtained from sections 7461 and 7462 of the Dept. of Veterans Affairs Health-Care Personnel Act of 1991. App. Opening Br. at A-28-9.

The citation at the bottom of proposed instruction 14 was *Noe v. U.S. Postal Service*, 28 M.S.P.R. 86, *3 (1985). ER at 69. On two occasions during the colloquy on the instructions, Johnson reminded the court about *Noe*. SERII 383:8; 398:1. *Noe* described his constitutionally protected statutory right:

> An employee against whom adverse action is taken is entitled to the procedural protections of 5 U.S.C. § 7513, which include advanced written notice and an opportunity to answer. The Supreme Court has recently reaffirmed that these two protections constitute due process requirements. *Cleveland Board of Education v. Loudermill*, --- U.S. ---, 105 S.Ct. 1487, 84 L.Fd.2d 494 (1985).

Noe at *3.

During the colloquy on the instructions, Johnson mentioned *Noe*, but the court seemed to be unfamiliar with this case. SERII 398:3. *Noe* had been an important citation in his motion for partial summary judgement on notification and in his trial brief. At trial, Johnson did not advocate any other theory of timely notification, since the theory described in *Noe* was the only theory for which he could find authority.[3]

Note 3. Two years after trial, Johnson realized that the Americans with Disabilities Act of 1991 defined timely notice as up to the time the decision for discharge is made. See e.g., *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 933 n.5 (7th Cir. 1995); *Landerfeld v. Marion General Hospital*, 994 F.2d 1178, 1181 (6th Cir. 1993). Later, he realized that the Rehabilitation Act of 1973 defined timely notice as up to 45 days after the effective date of discharge. 29 C.F.R. § 1614.105(a)(1) (1995); *Leorna v. U.S. Dept. Of State*, 105 F.3d 548, 551 (9th Cir. 1997).

C. Appellate Briefs

In appellant's opening brief, the second issue presented summarized his theory on timely notification and mentioned his constitutionally protected statutory right:

> Whether the Court Should Have Instructed the Jury That Notification of Disability During the Response Period After Proposed Discharge Was Timely, Since **This Was a Constitutionally Protected Statutory Right.** [Emphasis added.]

Appellant's Opening Br. at 5.

Section J of the brief described his legal theory and mentioned his constitutionally protected statutory right:

> [The] disciplinary and grievance procedures provided the employee with the right to respond to adverse actions both orally and in writing in a reasonable time, but not less than seven days. Dept. of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, 105 Stat. 187, 203 (1991). (App. at A-26.) **This right is protected by the Due Process Clause of the Fifth Amendment, as has been affirmed by the Supreme Court.** *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). [Emphasis added.]

Appellant's Opening Br. at 24-5.

The court was also provided with copies of the citations. In the appendix of the brief was a copy of both *Noe v. U.S. Postal Service* and selected sections of the Dept. of Veterans Affairs Health-Care Personnel Act of 1991; 38 U.S.C. § 7462(a)(3)(B). Appellant's Opening Br. at A-21 and A-26. In addition, a copy of plaintiff's motion for partial summary judgment on notification was included in the excerpts of record. ER at 32.

In the appellant's reply brief, his constitutionally protected statutory right was again mentioned. Appellant's Reply Br. at 4.

After the initial set of briefs had been submitted, the court of appeals appointed a pro bono attorney to represent Johnson and then scheduled supplemental briefs.

In the appellant's supplemental opening brief, the trial court's theory on timely notice was described and then, in error, was attributed to Johnson.[4] Appellant's Supplemental Opening Br. at 2;34. There was no mention of the constitutionally protected statutory right that formed the basis for proposed instruction 14.

The appellant's supplemental reply brief also asserted, in error, that Johnson argued at trial that timely notification was anytime up to discharge. Appellant's Supplemental Reply Br. at 14. This brief correctly stated that Johnson requested an instruction defining timely notification as any time within the response period after proposed discharge, but never mentioned that this was a constitutionally protected statutory right. Appellant's Supplemental Reply Br. at 15.

Note 4. During the first colloquy on proposed instruction 14, the trial court had refused to give this instruction. SERII at 392:24. During the second colloquy on proposed instruction 14, the trial court stated that "timely means in time for them not to issue the order [of discharge]". SERII 404:5. Johnson indicated that he would accept this type of instruction, but this was the trial court's theory, not Johnson's theory. SERII 404:8. When the court did not respond, he continued to argue for an instruction and mention his motion for partial summary judgment that first described his theory to the court. SERII at 404:22. During closing argument, after having lost the battle for proposed instruction 14, Johnson did use the trial court's theory on timely notification of disability in a one sentence argument. SERII 432:6.

III. Evidence Was Presented at Trial to Support a Claim That the Agency Deprived Johnson of the Procedural Right Expressed by Proposed Instruction 14

On January 12, 1993, Johnson sent a memorandum to the agency that stated "I saw Deidra McLauchlan, the station EEO Counselor for disabled persons, and filed an informal complaint of employment discrimination because of mental disability." The same day, he received a reply from the agency that stated:

> 3. Please note that contacting and providing information to an EEO Counselor through the informal complaint process does not constitute a "reply" for the Medical Center Director's consideration regarding your Proposed Removal from employment.

ER at 13.

During the colloquy on instruction 18, Johnson argued that the agency's position on this issue was incorrect, since it deprived him of a legitimate affirmative defense against the charges.[5] SERII 397-2.

Note 5. Johnson viewed his constitutionally protected statutory right in positive terms, in that he had a right to reply during the 7 day period, rather than in negative terms, in that the agency had infringed on his right to reply. He did not argue during closing argument or in the briefs submitted to the court of appeals that the agency had infringed on his right to reply, but as noted above, evidence was presented at trial to support this position.

IV. Decision Summary

In the decision on proposed instruction 14, the court of appeals did not mention the constitutionally protected statutory right that formed the basis for this instruction.

The court used an abuse of discretion standard, rather than a de novo standard of review, which would have been required for a constitutional error.

The trial court's theory on timely notification was attributed to Johnson to show that proposed instruction 14 was not needed.

The court also asserted that timely notice was not a major issue at trial and was not contested by the defendant, so any error in not giving proposed instruction 14 would not have been prejudicial; however, the court never mentioned the defense counsel's closing arguments that Johnson had not given the agency timely notice of disability.

REASONS FOR GRANTING THE PETITION

I. Introduction

The court of appeals often appoints a pro bono counsel to represent a pro se appellant and to submit supplemental briefs for the benefit of the court's review. When the initiating order specifies supplemental briefs, a pro se appellant is not likely to object, since the order implies that the initial pro se briefs will not be ignored. If the court then renders a decision without considering the initial pro se briefs, the pro se appellant is deprived of a reasonable opportunity to be heard, which violates the Due Process Clause.

To clarify the court of appeals' practice of using supplemental briefs by pro bono counsel, there is need for guidance from this Court, so as not to deprive a pro se appellant of due process of law. This case is a timely and rare opportunity to provide that guidance. Moreover, the decision below is erroneous and the issue that it addresses is important.

II. The Decision by the Court of Appeals on Proposed Instruction 14 Is Erroneous

A. The Decision Considered the Trial Court's Theory, Not Johnson's Theory

In the section of the opinion that discussed proposed instruction 14, the court of appeals stated that "Johnson contends that 'a proper instruction [would] define timely as anytime before discharge.'" App. at A-4. This was the trial court's theory on timely notification of disability, not Johnson's theory, which was based on a constitutionally protected statutory right.

B. The Court of Appeals Could Not Have Disposed of Proposed Instruction 14 by Other Means

1. Timely Notification Was a Major Issue at Trial

The court of appeals stated that timely notification of disability was not a major issue at trial, but then gave an example that showed that it was a major issue. The court stated:

> Defendants argued Johnson was fired for insubordination and not his alleged disability by emphasizing that **Johnson had never claimed a disability or sought accommodation until after he had already been given notice of proposed discharge** for insubordination. [Emphasis added.]

App. at A-5.

If the trial court had instructed the jury on his constitutionally protected statutory right, Johnson could have defended himself against this accusation. In closing argument, he could have read the instruction to the jury and then argued that he

did not tell the agency about his disability to protect his privacy and that he had a right to reply to the charges during the seven day period after proposed discharge.

2. Failure to Give Proposed Instruction 14 Was Not Harmless, Since Defense Counsel Argued That Johnson Did Not Give Timely Notice

During the second colloquy on proposed instruction 14, Johnson expressed his concern about not having an instruction on timely notification of disability, since defense counsel could argue that he had not notified the agency about his disability prior to the letter of proposed discharge. SERII 404:10. This is exactly what happened. During closing argument, defense counsel argued:

> Dr. Johnson, however, has not owned up to any of his own failings in this regard. He failed to disclose his prior psychiatric disorders to then. He was completely vague in his December 5th, 1991, memorandum. And I would invite you to review the memorandum and the correspondence that followed that. For months at a time, at least five times, he was asked to explain or in some other way fulfill the requirement, and each time he referred to the December 5th, 1991, memorandum.

SERII 450:4.

3. The Instructions as a Whole Did Not Tell the Jury That the Agency Had Notice of Disability Before Discharge

In describing the trial court's theory on timely notification of discharge, the court of appeals stated that "Paragraphs 3 and 4

[of instruction 12], read in sequence, tell the jury that the employer must have notice sometime before discharge of the employee; otherwise, the jury could not find that 'plaintiff was discharged because of his handicap.'" App. at 5. However, paragraph 4 of instruction 12 involved medical considerations, defined by instruction 19, which were independent of timely notice and would not have told the jury anything about timely notification.

At trial, Johnson was required to prove that he was discharged because of his handicap (paragraph 4 of instruction 12). This was explained by instruction 19, which stated:

> Discharged because of handicaps means that there is a connection between the employee's handicaps and discharge, such that **the handicaps caused the behavior that led to discharge**. [Emphasis added.]

Appellant's Reply Br. at A-33. *Teahan v. Metro-North Commuter Railroad Co.*, 951 F.2d 511, 515-6 (2nd Cir. 1991); *Jackson v. Veterans Administration*, 22 F.3d 277, 280-1 (11th Cir. 1994).

Therefore, the question was whether the handicap (mental disorder) caused the behavior (refusal to take the test) that led to discharge. Since the jury had no detailed knowledge of the mental disorder, this question could only be answered by expert psychiatric witnesses and was unrelated to notice. Proof of paragraph 4 of instruction 12 would not have told the jury anything about whether Johnson had notified the agency about his handicap prior to discharge.[6]

Note 6. As an example, if Johnson had been discharged without telling the agency about his handicap, paragraph 4 could still have been proven at trial, but there obviously would have been no notice of handicap before discharge. In the current case, the court apparently confused behavior with handicap. If paragraph 4 had stated that "Plaintiff was discharged because of his behavior," then the court's reasoning would have been correct; however, since it referred to handicaps, proof of paragraph 4 did not tell the jury anything about timely notification.

C. A Stringent Standard of Review and Harmless Error Analysis Is Required for a Civil Case With Federal Constitutional Error

This case required a more stringent standard of review and harmless error analysis than the usual civil case, because it contained a federal constitutional error.

The review should have been de novo, rather than abuse of discretion, *United States v. Duran*, 59 F.3d 938, 940-1 (9th Cir. 1995).

Since Johnson's legal theory was first presented to the trial court in a motion for partial summary judgment on notification and since it involved a constitutionally protected statutory right, it should have been considered to be a legal theory and not just a minor point of law. In the Ninth Circuit for both civil and criminal cases, "[a] party is entitled to an instruction concerning his or her theory of the case if it is supported by law and has some foundation in the evidence." *Jenkins v. Union Pacific R. Co.*, 22 F.3d 206, 210 (9th Cir. 1994). "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." *United States v. Escobar De Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984).

A more stringent harmless error analysis was also required. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was

harmless beyond a reasonable doubt. *Chapman v. State of California*, 386 U.S. 18, 25 (1967).[7] Therefore, in this case, which was a civil case with a federal constitutional error, the case could not have been disposed of on the basis that the error was not prejudicial, without conducting a more stringent harmless error analysis.

Note 7. Recently, *in Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992), which was a civil case with a federal constitutional error, the court used a more probable than not harmless error rule, citing *Coursen v. A.H. Robins Co. Inc.*, 764 F.2d 1329, 1337 (9th Cir. 1985). *Coursen*, without analysis, cited *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1457 (9th Cir. 1983). In *Haddad*, which was a civil case with no constitutional error, the court put the distinction between constitutional and non-constitutional error to one side in their detailed analysis of the harmless error rule. *Haddad* 720 F.2d at 1458. Therefore, it can be argued that *Haddad* does not apply to civil cases with federal constitutional error. In *Caballero*, despite the use of a more probable than not harmless error rule, the court provided a very extensive and detailed harmless error analysis.

III. The Question Presented Is Important

It is common practice for a court of appeals to appoint a pro bono counsel to represent a pro se appellant and prepare supplemental briefs. The order is often initiated by an appellate commissioner. When the initiating order specifies supplemental briefs, the pro se appellant is not likely to object, since the order implies that the initial pro se briefs will not be disregarded. One problem with this practice is that a pro bono counsel may not be as diligent as a fee-for-service counsel. Another problem is that the court may only use the pro bono briefs and not consider the pro se briefs. If this occurs, the pro se appellant is deprived of a reasonable opportunity to be heard, which violates the Due Process Clause.[8]

This case involved the discharge of a federal employee, who was proceeding pro se. At trial, a government defense was that the Johnson did not notify the agency about his mental disability until after proposed discharge; however, the trial court refused to instruct the jury on his right to reply to the charges after proposed discharge, which was based on the Due Process Clause and 38 U.S.C. § 7462(a)(3)(B). This right is a well settled procedural right accorded to federal employees against whom adverse action is proposed. *LaChance v. Erickson*, 118 S.Ct. 753, 755 (1998). On appeal, this constitutionally protected statutory right was described by Johnson in both his opening and reply briefs. The court then appointed a pro bono counsel to represent Johnson and to prepare supplemental briefs. App. at A-7;A-8. The

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Note 8. Under Fed. R. App. P. 47(b), the court of appeals may issue any order to regulate practice in a particular case, with the exception that the order may not violate the Constitution or a statute. *Ortega-Rodriguez v. U.S.*, 507 U.S. 234, 253-4 (1993); *Thomas v. Arn*, 474 U.S. 140, 147 (1985).

constitutionally protected statutory right was not considered in the supplemental briefs by the pro bono counsel or in the decision by the court of appeals.[9] The failure of the court to consider the initial pro se briefs deprived Johnson of a reasonable opportunity to be heard, which violated the Due Process Clause.

The public trust in the judiciary depends on fair dealing by the courts. To be fair, a decision must reflect that the court has recognized the appellant's claim, has analyzed the claim, and has rejected or accepted the claim for good reason. The Court is urged to take the long view and to reaffirm its commitment to the rule of law. Since this case involved a constitutional error by both the trial court and the court of appeals, this case should be returned to the court of appeals.[10]

In sum, this case presents a rare opportunity for this Court to clarify the guidelines for the court of appeals' practice of using supplemental briefs by pro bono counsel, so as not to deprive a pro se appellant of due process of law. Therefore, the Court should grant the petition.

Note 9. The phrase "constitutionally protected statutory right" was in the table of contents and the issue presented of Johnson's opening brief and in the table of contents of his reply brief, which would have been noted in a very brief scan of both briefs. This suggests that the court never read either of these briefs.

Note 10. As provided by 28 U.S.C. § 2106, summary reversal may be justified for clear cases of constitutional error. *Eaton v. City of Tulsa*, 415 U.S. 697, 708 (1974); *Johnson v. Board of Ed. of the City of Chicago*, 457 U.S. 52, 55 (1982). Summary reversal is appropriate here, because this case is one of clear constitutional error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Memorandum decision A-1

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Filed Dec 17 1997 Cathy A. Catterson, Clerk U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN JOHNSON	) No. 95-36261
Plaintiff-Appellant	) D.C. No. CV-94-05374-RJB
v.	) MEMORANDUM*
JESSE BROWN, Secretary of Veteran Affairs,	)
Defendant-Appellee.	)

Appeal from the United States District Court for Western District of Washington, Robert J. Bryan, District Judge, Presiding

Argued and Submitted November 4, 1997, Seattle, Washington

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER, ** Senior District Judge

Stephen Johnson appeals the district court's judgment entered on a jury verdict in favor of defendant-appellee,

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Secretary of Veterans Affairs. Johnson, a cardiologist employed at the American Lake Veterans Affairs Medical Center, alleged that he was discharged because of his mental and physical disability, in violation of the Rehabilitation Act of 1973. 29 U.S.C. secs. 791 and 794 ("the Act").

The appeal raises two issues: (1) whether the court committed reversible error in giving Instruction 18, and (2) whether the court committed reversible error in failing to give an instruction defining timeliness.

DISCUSSION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. sec. 1331 and 29 U.S.C. secs. 791 and 794. This court has jurisdiction pursuant to 28 U.S.C. sec. 1291.

A. Instruction 18 -- Knowledge of an Employee's Nonobvious Disability

Instruction 18 stated:

> An employer knows an employee has a disability when the employer is told of or learns of a claimed disability, and the employer has information from which the employer should reasonably conclude that the claim of disability is probably true.

Johnson contends that this instruction misstates the law defining "knowledge" by imposing a burden upon the employee to provide additional information to the employer regarding the disability in order to state a claim under the Act. Instead, Johnson argues, notice of a disability from an employee and a request for reasonable accommodation is sufficient to trigger the employer's obligations under the Act.

On appeal from the giving of an instruction, "the adequacy of jury instructions is not determined by the giving of any one instruction, but examining the instructions as a whole," United States v. Ancheta, 38 F.3d 1114, 1116 (9th Cir. 1994) (quoting United States v. Boekelman, 594 F.2d 1238, 1240 (9th Cir. 1979); see also City of Long Beach v. Standard Oil Co. of Cal., 46 F.3d 929, 933 (9th Cir. 1995). Alleged misstatements of the law in jury instructions are reviewed de novo if necessary elements to be proved at trial are involved. Standard Oil, 46 F.3d at 933. Assuming (without deciding) that Johnson's objection to Instruction 18 viewed in isolation has merit, that instruction must be examined in the context of all the instructions the court gave. In Instruction 21 the court dealt specifically with the employer's duty to investigate. It stated:

> When a federal employer becomes aware, or reasonably should be aware, that an employee is a handicapped person, the employer must conduct a reasonable inquiry into the employee's work and mental history, [and] analyze the nature of the employee's handicap . . . .

This instruction, by articulating the employer's duty of reasonable inquiry, specifically addressed Johnson's objection that Instruction 18 allowed the employer to avoid claims by doing nothing or placed a burden on the employee to provide additional information. Even if Instruction 18 were interpreted as requiring that the employer have reliable information, Instruction 21 imposed an affirmative obligation on the employer to investigate even if it only had reason to believe that an employee has a disability. The two instructions, read together, sufficiently explain the requirements of the law and satisfy Johnson's objections.

B. Proposed instruction 14 -- Definition of "In a Timely Manner"

Instruction 12 (to which no objection was made) correctly stated the requisite elements of Johnson's claim. It stated in relevant part:

> On plaintiff's employment discrimination claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> . . .
>
> 3. Plaintiff notified the Agency about his handicaps in a timely manner, so they knew or should have known that he was an individual with handicaps; and
>
> 4. Plaintiff was discharged because of his handicaps.

Johnson complained that the court failed to give a definition of the phrase "in a timely manner' but proposed no instruction on the point. Johnson offered Proposed Instruction 14, entitled "Notification About Handicaps," which did not explicitly define "in a timely manner" but instructed that, to obtain reasonable accommodation, the employee must notify the agency and may do so as late as his reply to a notice of proposed discharge. The court declined to give the instruction because it found no need for further definition of "in a timely manner" when defendants clearly had notice of the alleged disability before issuing the order of discharge.

The wording or formulation of jury instructions is reviewed for abuse of discretion to determine if they are misleading or inadequate. See Oglesby v. Southern Pac. Transp. Co., 6 F.3d 603, 606 (9th Cir. 1993). Johnson contends that "a proper instruction [would] define timely as anytime before discharge." Instruction 12, however, fairly read, made that point.

Paragraphs 3 and 4, read in sequence, tell the jury that the employer must have notice sometime before discharge of the employee; otherwise, the jury could not find that "plaintiff was discharged because of his handicap."

Furthermore, Johnson's assertion that "[w]hether Johnson notified the Agency about his disability 'in a timely manner' was a major issue at trial" is, in fact, false. The issue of timeliness was not contested by the defendants at trial. Defendants argued Johnson was fired for insubordination and not for his alleged disability by emphasizing that Johnson had never claimed a disability or sought accommodation until after he had already been given notice of proposed discharge for insubordination. Thus the issue was not the timeliness of notice but rather the reason for discharge, i.e., whether the discharge was because of his asserted disability. Thus, even if the instructions were deficient with regard to defining "in a timely manner," any error was not prejudicial.

CONCLUSION

We conclude that the instructions, considered as a whole, fairly and adequately covered the issues presented, correctly stated the law and were not misleading, and that the district court did not abuse its discretion. See Abromson v. American Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997). Accordingly, the judgment is AFFIRMED.

Filed Mar 3 1998 Cathy A. Catterson, Clerk U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN JOHNSON,	) No. 95-36261
	)
Plaintiff-Appellant,	) D.C. No. CV-
	) 94-05374-RJB
v.	)
	)
JESSE BROWN, Secretary of Veteran Affairs,	) ORDER
	)
Defendant-Appellee.	)

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* Senior District Judge

The panel as constituted above has voted to deny the petition for rehearing. Judges Fletcher and O'Scannlain vote to reject the suggestion for rehearing en banc, and Judge Schwarzer so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Filed Mar 13 1997 Cathy A. Catterson, Clerk U.S. Court of Appeals

UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN JOHNSON,	) No. 95-36261
	)
Plaintiff-Appellant,	) D.C. No. CV-
	) 94-05374-RJB
v.	) Western
	) Washington
JESSE BROWN, Secretary of Veteran Affairs,	) Tacoma
	)
	) ORDER
Defendant-Appellee.	)
	)

Before: Peter L. Shaw, Appellate Commissioner

Upon review of the record and the briefing in this appeal, this court has determined that the appointment of pro bono counsel in this appeal would benefit the court's review. The court by this order expresses no opinion as to the merits of this appeal. The Clerk shall enter an order appointing pro bono counsel to represent appellant for purposes of this appeal only and establishing a supplemental briefing schedule. The appeal is stayed pending further order by this court.

If appellant objects to the court's appointment of counsel in this appeal, he shall file a written objection within 14 days after the date of entry of this order.

General Order 6.3(3)

Filed Mar 27 1997 Cathy A. Catterson, Clerk U.S. Court of Appeals

UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN JOHNSON,	) No. 95-36261
	)
Plaintiff-Appellant,	) D.C. No. CV-
	) 94-05374-RJB
v.	) Western
	) Washington
JESSE BROWN, Secretary	) Tacoma
of Veteran Affairs,	)
	) ORDER
Defendant-Appellee.	)
	)

Persuant to this court's March 13, 1997 order appointing pro bono counsel for appellant, Nick Wagner, Esq. is hereby appointed to represent appellant in this appeal. If appellant does not object to this order in writing within 14 days from the date of entry of this order, the Clerk shall amend the record to reflect that Nick Wagner, Esq., of Hendricks and Lewis, 2675 1st Interstate Center, 999 Third Avenue, Seattle, Washington, 98104, (206) 624-1933, is the counsel of record for appellant in this appeal. The Clerk shall serve on counsel for appellant a copy of the district court record. This order shall be served on appellant as well as counsel for appellant.

Supplemental briefing shall proceed as follows: appellant's supplemental opening brief is due June 13, 1997; appellee's supplemental answering brief is due July 14, 1997; and appellant's optional supplemental reply brief is due August 13, 1997. This appeal shall be calendered for oral argument in Seattle.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

Julie Ronken, Deputy Clerk
Local Rule 27-7